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SUMMARY JUDGMENT IN MINNESOTA: A SEARCH FOR PATTERNS

JAMES R. PIELEMEIER†

Although the Minnesota Supreme Court frequently has stated that the moving party has the burden of demonstrating clearly the nonexistence of a genuine issue of material fact on a motion for summary judgment, Professor Pielemeier's analysis of recent Minnesota decisions indicates that the extent of that burden differs depending on whether the moving party or the party opposing the motion will have the burden of proof on dispositive issues at trial. Professor Pielemeier identifies four paradigm situations in which motions for summary judgment typically are made and provides the analytical framework to aid both litigants and courts in determining when summary disposition is warranted.

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I. INTRODUCTION

To make a successful Rule 56 motion for summary judgment¹ is

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1. MINN. R. CIV. P. 56.01-.07.

Summary judgment procedure first appeared in England in 1855. Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict., c. 67. The law permitting the procedure was enacted in response to economic and social pressures from mercantile groups who desired a more efficient method for enforcing and collecting debts than was available in the common law and chancery courts. Bauman, *The Evolution of the Summary Judgment Procedure*, 31 IND. L.J. 329, 330-31, 338 (1956). Initially the procedure was limited to creditor-debtor actions. *Id.* at 339-40. Despite this original limitation, summary judgment procedure was soon extended to include all but a few types of actions. *Id.* at 339-40. Currently in England, the procedure is not generally used in personal injury and road accident cases. *Id.* at 341-42.

Summary judgment procedure in the United States had its source in the English practice. *Id.* at 343. While a few states had adopted summary judgment procedures prior to adoption of FED. R. CIV. P. 56 in 1938, the general trend toward adoption of summary judgment procedure postdated the federal rule. Bauman, *supra*, at 351; Clark, *The Sum-*

one of the most difficult challenges that Minnesota attorneys face. While the basic standard for judging these motions is relatively clear,² inconsistent cases³ and supreme court language requiring rigorous standards of proof⁴ make any summary judgment motion a chancy proposition at best, even though the case may be clear cut in the attorneys' minds. For example, in *Rossman v. 740 River Drive*,⁵ a negligence action was brought against a landlord for property loss allegedly arising from his failure to adequately maintain an apartment complex security system. Defendant moved for summary judgment on the ground that an exculpatory provision in the lease precluded a negligence action. Both parties agreed that there was no dispute of material fact and that the validity of the exculpatory clause was the sole issue before the court.⁶ The district court granted summary judgment for defendant and plaintiff appealed. On appeal, both parties again represented that all facts necessary to determine the validity of the exculpatory clause in a negligence action were before the court.⁷ Notwithstanding

mary Judgment, 36 MINN. L. REV. 567, 571 (1952). Initially, a constitutional question regarding denial of the right to trial by jury impeded use of the motion for summary judgment. The constitutional issue was settled in *Ex parte Peterson*, 253 U.S. 300 (1920), in which the Supreme Court held that the right to a jury trial did not extend to cases in which there were no issues of fact to be determined. Prior to adoption of the federal rule, however, reluctance to use summary judgment procedure remained because of the difficulty in determining whether a particular case fit the rather limited application of the procedure. See 3 D. MCFARLAND & W. KEPPEL, MINNESOTA CIVIL PRACTICE § 1651, at 231-32 (1979). By 1952 30 states had adopted some form of summary judgment procedure. See Clark, *supra*, at 568.

Patterned after the federal rule, MINN. R. CIV. P. 86.01 (original version at Minn. R. Civ. P. 56, 278 Minn. 70 (1968)) was adopted in 1951, effective January 1, 1952. 232 Minn. vii (1951). The Minnesota rule avoided the problem of applicability because it extended to all civil actions, both legal and equitable. See *Slezak v. Ousdigian*, 260 Minn. 303, 313-14, 110 N.W.2d 1, 8 (1961); Clark, *supra*, at 569. There have been no constitutional challenges of the Minnesota rule. The basic purpose of the Minnesota summary judgment rule is the same as the early English and American rules: "to afford procedure for the just, speedy, and inexpensive disposition of actions where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Lindgren v. Sparks*, 239 Minn. 222, 225, 58 N.W.2d 317, 319-20 (1953). See *Delgado v. Lohmar*, 289 N.W.2d 479, 483 (Minn. 1979); *Vieths v. Thorp Fin. Co.*, 305 Minn. 522, 524-25, 232 N.W.2d 776, 778 (1975); *Ahlm v. Rooney*, 274 Minn. 259, 262-63, 143 N.W.2d 65, 68 (1966).

2. See note 25 *infra* and accompanying text.

3. See notes 73-82 *infra* and accompanying text.

4. See note 22 *infra* and accompanying text.

5. 308 Minn. 134, 241 N.W.2d 91 (1976).

6. Appellant's Brief and Appendix at A-19.

7. 308 Minn. at 136, 241 N.W.2d at 92; Respondent's Brief at 18, 20. Cf. Appellant's Brief and Appendix at 29 (only issues of fact pertained to misrepresentation and breach of warranty theories). Plaintiff contended on appeal that the trial court erred in

these stipulations, the Minnesota Supreme Court reversed and remanded the case for development of facts necessary to a finding of causal negligence.⁸

Decisions of this nature appear to justify the somewhat cynical belief of some attorneys that as a practical matter the Minnesota summary judgment rule is nonexistent. At the least, the utility of these motions as viewed by the bench and bar is controverted. A survey conducted for the purposes of this Article⁹ indicates that while the majority of responding Minnesota attorneys and district court judges feel that the Minnesota Supreme Court's attitude toward summary judgment is "about right,"¹⁰ over three-fourths of the responding attorneys believe that district court judges deny too many summary judgment motions¹¹ and that *many* district court judges deny summary judgment as a matter of course.¹² Be-

dismissing her entire complaint. She asserted that the motion had been one for partial summary judgment on her negligence claim only, and was not intended to place in issue her contentions that defendant was liable on theories of misrepresentation and breach of warranty, notwithstanding the exculpatory clause. *See id.* at 27-30.

8. 308 Minn. at 138, 241 N.W.2d at 93. Michael Scherschligt, Associate Professor of Law at Hamline University School of Law, was one of the attorneys for defendant in *Rossman*. Professor Scherschligt related to this writer that "[t]he attorneys for both parties concluded that further investigation into the facts would be unduly expensive and possibly fruitless. Accordingly, they felt the best manner to efficiently dispose of what was at least the threshold issue in the lawsuit was to obtain summary judgment on the legal validity of the exculpatory clause based on facts that had been determined at the time of the motion. . . . [B]oth parties viewed the matter as essentially constituting cross-motions for summary judgment on the validity of the exculpatory clause in a negligence action" Interview with Michael V. Scherschligt, Associate Professor of Law, Hamline University School of Law (Nov. 19, 1980) (on file at William Mitchell Law Review office).

9. In August 1980 questionnaires on summary judgment were mailed to 50 Minnesota district court judges and 50 Minnesota attorneys. *See* note 85 *infra* and accompanying text. Thirty-two judges (64%) and 26 attorneys (52%) responded. *See* note 86 *infra*. The Minnesota summary judgment questionnaire and survey responses are printed in the Appendix to this Article.

10. *See* Appendix, Judge's Form, Question J-7 (81% of responding judges agreed with statement in text); *id.*, Attorney's Form, Question A-8 (55% of responding attorneys agreed with statement in text).

11. *See id.*, Attorney's Form, Question A-9A (82% of responding attorneys agreed with statement in text).

12. *See id.*, Attorney's Form, Question A-11A (81% of responding attorneys agreed with statement in text). *Cf. id.*, Judge's Form, Question J-12 (35% of responding judges agreed with statement in text). *But see id.*, Question J-9 (94% of responding judges report they *always* read supporting and opposing memoranda before deciding summary judgment motions; remainder of responding judges report they *usually* do so).

It is possible that careful review of the record may be a factor in the denial of many summary judgment motions. Half of the responding judges indicated that even when the parties stipulate that there is no genuine issue of fact, they still intend to examine counsel and the record to determine whether any material issues of fact were overlooked. *See id.*, Question J-4C (52% of responding judges agreed with this statement). While judicial ac-

cause of the belief that judges are too inclined to deny these motions, half of the responding attorneys report that they do not make summary judgment motions even when they believe as a matter of law that the motion should be granted.¹³ Nearly one-third of the responding attorneys conclude that summary judgment procedure in Minnesota is "generally useless."¹⁴

In contrast, over half of the responding district court judges favor summary judgment as a useful time-saving tool to weed out frivolous cases,¹⁵ although one-third of them assert that the rule is markedly overused and misused by attorneys.¹⁶ One-fourth of the responding judges believe that more often than not, attorneys bring summary judgment motions to increase the ultimate expense of the litigation to their clients and thereby benefit themselves financially.¹⁷ Over one-third of the responding judges believe that at least half of the time, attorneys bring summary judgment motions simply to show their clients they are "doing something."¹⁸

While these survey responses reflect disparities between judges' opinions of attorneys bringing summary judgment motions and attorneys' opinions of judges deciding them, both groups agree that only a small percentage of the motions are granted at the trial

tivism in "finding" issues of fact in this manner may effectuate the most "just" result, it may on the other hand result in a decision based upon less relevant facts or legal theories that opposing counsel may have considered and rejected. As a practical matter, such judicial activism undermines the philosophy that the adversary system is the most appropriate manner by which to arrive at a proper resolution. In addition, it tends to ignore the possibility that the parties entered into a stipulation because it was uneconomical to delve deeper into the facts. *See* *Rossman v. 740 River Drive*, 308 Minn. at 138, 241 N.W.2d at 93; note 8 *supra*; *cf.* *Downes v. Beach*, 587 F.2d 469, 472 (10th Cir. 1978) (trial court not required to consider issues parties fail to raise on summary judgment motion).

13. *See* Appendix, Attorney's Form, Questions A-6, A-7. *Cf. id.*, Question A-11C (40% of responding attorneys agreed that motion for summary judgment is waste of time even when motion has merit as matter of law).

14. *See id.*, Question A-1C (30% of responding attorneys agreed with statement in text). *Cf. id.*, Judge's Form, Question J-1C (only 6% of responding judges agreed with statement in text).

15. *See id.*, Judge's Form, Question J-1A (55% of responding judges agreed with statement in text).

16. *See id.*, Question J-2A (32% of responding judges agreed with statement in text). *Cf. id.*, Attorney's Form, Question A-5 (88% of responding attorneys report they rarely or never make summary judgment motions when they have substantial doubt about its merit).

17. *See id.*, Judge's Form, Question J-3B (24% of responding judges agreed with statement in text).

18. *See id.*, Question J-3F (37% of responding judges agreed with statement in text). *Cf. id.*, Attorney's Form, Question A-12E (81% of responding attorneys report that showing client they are "doing something" is never a motive in making motion for summary judgment).

court level.¹⁹ This may result in part from a lack of understanding of the proper use of summary judgment procedure by attorneys²⁰ and in part from the great reluctance of trial court judges to grant summary judgment motions in general.²¹ This reluctance may well be encouraged by strict supreme court language to the effect that summary judgment should not be granted if there is "any doubt" as to the existence of a genuine issue of material fact.²² While federal circuit court opinions have encouraged the use of summary judgment in appropriate cases,²³ that kind of encour-

19. See *id.*, Judge's Form, Question J-10 (32% of responding judges report that they grant 10% or less of summary judgment motions made before them; 58% of responding judges report that they grant 25% or less of summary judgment motions made before them; 81% of responding judges report that they grant 50% or less of summary judgment motions made before them; 100% of responding judges report that they grant 75% or less of summary judgment motions made before them); *id.*, Attorney's Form, Question A-3 (65% of responding attorneys report that 10% or less of their summary judgment motions are granted by trial court; 77% of responding attorneys report that 25% or less of their summary judgment motions are granted by trial court; 92% of responding attorneys report that 50% or less of their summary judgment motions are granted by trial court; 100% of responding attorneys report that 75% or less of their summary judgment motions are granted by trial court).

20. See *id.*, Judge's Form, Question J-11 (25% of responding judges believe that less than 50% of attorneys have sufficient understanding of summary judgment rule to invoke it in appropriate cases and make pertinent arguments).

21. See note 12 *supra* and accompanying text.

22. *Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 230, 219 N.W.2d 641, 646 (1974) (emphasis added); cf. 3 D. MCFARLAND & W. KEPPEL, *supra* note 1, § 1654, at 241 (*Rathbun* language more strict than standard apparently applied by Minnesota Supreme Court).

23. See, e.g., *American Tel. & Tel. Co. v. Delta Communications Corp.*, 590 F.2d 100 (5th Cir. 1979), *cert. denied*, 444 U.S. 926 (1980); *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977). In *Delta Communications*, the court stated:

In passing on motion for summary judgment, even where the underlying facts are undisputed, it is hornbook law that the court must indulge every *reasonable* inference from those facts in favor of the party opposing the motion. Insofar as any weighing of inferences from given facts is permissible, the task of the court is not to weigh these against each other but rather to cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness, casting aside those which do not meet it and focusing solely on those which do. If a frog be found in the party punch bowl, the presence of a mischievous guest—but not the occurrence of spontaneous generation—may reasonably be inferred.

590 F.2d at 101-02 (emphasis in original). Accordingly, the *Putnam* court stated that in reviewing the motion

all evidence and inferences therefrom are to be construed in the light most favorable to the party opposing the motion. . . . Nevertheless, the opponents' version of the facts must support a viable legal theory which would entitle them, if accepted, to a judgment as a matter of law.

. . . [A]n opposing party may not defeat a summary judgment motion, once the movant has met his burden, in the absence of "any significant probative evidence tending to support the complaint." . . . To hold otherwise would give

agement is notably lacking in Minnesota Supreme Court opinions.

Notwithstanding the foregoing, summary judgment has been affirmed in several recent Minnesota Supreme Court cases, although the rationale and supporting documentation was not always clearly stated. The purpose of this Article is to identify the underlying patterns in Minnesota summary judgment decisions and to set forth an approach to aid both litigants and courts in determining when summary disposition is warranted. This Article will review the basic operation of Minnesota Rule 56 and its relation to the discovery process, and discuss whether the ultimate burden of proof at trial should affect how a court views the motion. Recent Minnesota Supreme Court decisions on summary judgment will be categorized into four paradigms, and focusing on what the court has *done* as opposed to what it has merely *said*, the Article will suggest which of these paradigms appear to be most appropriate for summary resolution.

II. THE OPERATION OF RULE 56 AND ITS RELATIONSHIP TO DISCOVERY

A primary purpose of the summary judgment rule is to allow a party who is faced with a claim or defense that has no substance in law or fact to avoid the delay and expense of unfounded litigation.²⁴ To effect this purpose, the basic standard for summary judgment in Minnesota requires that it be "rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law."²⁵

free rein to any plaintiff who can draft an antitrust complaint capable of withstanding a motion to dismiss to go to trial with only a wing and a prayer supporting his well drafted complaint.

553 F.2d at 624.

24. When the alleged claims or defenses have no basis in fact, summary judgment provides a means by which further litigation can be short-circuited. See 3 D. McFARLAND & W. KEPPEL, *supra* note 1, § 1651, at 231 & nn.48-49; note 1 *supra*.

25. MINN. R. CIV. P. 56.03. Rule 56.03 was carefully drafted. See Clark, *supra* note 1, at 571 (Minnesota rule was based on federal rule). In Sauter v. Sauter, 244 Minn. 482, 485, 70 N.W.2d 351, 353 (1955), the Minnesota Supreme Court noted that the words of Rule 56.03 "need no amplification since they speak for themselves."

The terms "genuine issue" and "material fact" have been clearly defined by the Minnesota court. Attempts at substitution of alternative standards or definitions have been unsuccessful. A genuine issue is one that is not "so frivolous and so insubstantial that it would be futile to try [it]." A & J Builders Inc. v. Harms, 288 Minn. 124, 133, 179 N.W.2d 98, 103 (1970). See also Whisler v. Findeisen, 280 Minn. 454, 456, 160 N.W.2d 153, 155

The logical starting point in determining the propriety of making or granting a motion for summary judgment is to examine the issues raised in the pleadings. For example, if a complaint fails to include all allegations required to state a claim as a matter of substantive law or if the answer admits all essential allegations of the complaint and sets forth no affirmative defenses, judgment on the pleadings may be appropriate,²⁶ but these situations are rare.²⁷ A more typical situation may be characterized by the following hypothetical: the complaint alleges facts *A*, *B*, and *C*, all of which are required to state a claim as a matter of substantive law; the answer admits fact *A*, denies or is deemed under the rules to deny²⁸ facts *B* and *C*, and sets forth as an affirmative defense fact *D*, to which no reply is required and that is deemed to be denied by the plaintiff under the rules.²⁹ In this hypothetical, facts *B*, *C*, and *D* are in dispute. Fact *A* need not be considered on motion for summary judgment, except perhaps by way of a recitation that it is not in dispute.

In this hypothetical, more options are available to the defendant on a motion for summary judgment than to the plaintiff. The defendant theoretically can succeed on the motion by showing there is no dispute regarding the *nonexistence* of either fact *B* or *C*, or by showing there is no dispute regarding the *existence* of fact *D*. If

(1968). A material fact is one whose resolution will affect the result or outcome of the case. *Zappa v. Fahey*, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (1976) (per curiam); *Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 229, 219 N.W.2d 641, 646 (1974).

26. See *Abresch v. Northwestern Bell Tel. Co.*, 246 Minn. 408, 412, 75 N.W.2d 206, 209 (1956) (when motion for summary judgment is decided on sufficiency of pleadings to state cause of action, it should be considered as 12.03 motion for judgment on the pleadings).

27. See *Jacobson v. Rauenhorst Corp.*, 301 Minn. 202, 206, 221 N.W.2d 703, 706 (1974) (if counterclaim or affirmative defense does not raise material issue of fact, plaintiff's motion for judgment on the pleadings should be granted; contractual provision relied on as third-party defense interpreted as matter of law in favor of third-party plaintiff), *overruled in part on other grounds*, *Farmington Plumbing & Heating Co. v. Fischer Sand & Aggregate, Inc.*, 281 N.W.2d 838, 842 n.4 (Minn. 1979); *Bailey v. University of Minn.*, 290 Minn. 359, 187 N.W.2d 702 (1971) (relief sought against Board of Regents unavailable because decree or judgment would be incapable of terminating the controversy); *O'Brien v. Kemper*, 276 Minn. 202, 149 N.W.2d 487 (1967) (when defense of fraud stricken nothing was left in the answer but admissions of plaintiff's claim, motion for judgment on the pleadings was properly granted); *Royal Realty Co. v. Levin*, 244 Minn. 288, 290-91, 69 N.W.2d 667, 670 (1955) (portion of complaint pleading fraud without the particularity required held insufficient and subject to dismissal); *Wallner v. Schmitz*, 239 Minn. 93, 97, 57 N.W.2d 821, 824 (1953) (complaint alleging release obtained by duress subject to dismissal absent allegations of particular facts constituting duress).

28. See MINN. R. CIV. P. 8.02 (allegations of lack of knowledge have effect of denial).

29. *Id.* 7.01, 8.04.

the defendant succeeds in proving any *one* of these three matters and the plaintiff does not effectively counter this proof, the only conclusion to be drawn is that the plaintiff does not have the evidence to back up the claim or that the defendant has a conclusive defense regardless of what the plaintiff proves. Accordingly, summary judgment should be entered for the defendant. Under the hypothetical, it is more difficult for the plaintiff to succeed on his motion for summary judgment. Plaintiff must show there is no dispute regarding the *existence* of *both* facts *B* and *C* and the *nonexistence* of fact *D*. Even if these requirements are met, the defendant can defeat plaintiff's motion by presenting evidence showing a genuine dispute as to the *existence* or *nonexistence* of only *one* of these facts.

One way of proving or disputing the existence or nonexistence of a fact on motion for summary judgment is by affidavit. Rule 56.05 requires affidavits to set forth facts that are admissible into evidence and to show affirmatively that the affiant is competent to testify to the matter attested.³⁰ Accordingly, an affidavit generally must reflect personal first-hand knowledge.³¹ Usually the party who has or is in control of witnesses with first-hand knowledge of pertinent facts will submit affidavits in support of or in opposition to a summary judgment motion. The party who does not have or control these witnesses or admissible documentary evidence may be forced to use discovery to support or contest the motion. Rule 56.03 specifically provides for the use of depositions, interrogatory answers, and admissions in support of or in opposition to a summary judgment motion.³² These devices can be used to obtain information on specific facts supporting the allegations in the pleadings and the evidence marshalled to establish those facts. At times, responses to discovery may disclose that the evidence is non-existent or insufficient as a matter of law to support the necessary allegations in the pleadings, thereby providing the evidentiary basis for a summary judgment motion.

The rules in effect require a party who cannot supply affidavits in opposition to a sufficiently supported summary judgment motion to use information obtained through discovery to support his

30. *Id.* 56.05.

31. *Peterson v. American Family Mut. Ins. Co.*, 280 Minn. 482, 487-88, 160 N.W.2d 541, 544-45 (1968); *Couillard v. Charles T. Miller Hosp., Inc.*, 253 Minn. 418, 420-21, 92 N.W.2d 96, 98 (1958); MINN. R. CIV. P. 56.05; 3 D. McFARLAND & W. KEPPEL, *supra* note 1, § 1656, at 245-46.

32. MINN. R. CIV. P. 56.03.

opposition.³³ An opposing party may not rest on mere averments or denials in his pleadings successfully to oppose the motion.³⁴ Rather, facts impeaching the veracity of proof supporting the motion must be presented by the time the ruling on the motion is made.³⁵ Often the only way to obtain these facts is through discovery.³⁶ Accordingly, courts construing the federal summary judgment rule require the party opposing a sufficiently supported motion not only to assert the need to use further discovery to postpone an immediate ruling against him, but also to demonstrate affirmatively why discovery has not already been used to obtain the necessary opposing material. Moreover, the opposing party must show how postponement of a ruling will enable that party—by discovery or other means—to rebut the moving party's showing of the absence of a genuine issue of material fact.³⁷

The policy behind the rules and decisions just discussed is clear. Generally, evidence submitted on a motion for summary judgment must be equivalent in testamentary value to that which the parties anticipate presenting at trial.³⁸ If the evidence supporting the mo-

33. See *id.* 56.06.

34. *Id.* 56.05. Accordingly, the Minnesota Supreme Court has held that the party opposing the motion may not "create a fact issue by claiming that the facts which may be developed on cross-examination at the time of trial will permit him to reach the trier of facts." *County of Hennepin v. Mikulay*, 292 Minn. 200, 204, 194 N.W.2d 259, 262 (1972).

35. See, e.g., *Eakman v. Brutger*, 285 N.W.2d 95, 97 (Minn. 1979); *Erickson v. General United Life Ins. Co.*, 256 N.W.2d 255, 258-59 (Minn. 1977); *Manpower, Inc. v. Best Temporaries, Inc.*, 293 Minn. 369, 370-71, 196 N.W.2d 288, 290 (1972) (*per curiam*); *Vosbeck v. Lerdall*, 245 Minn. 164, 167-68, 72 N.W.2d 371, 374 (1955).

36. For example, if the defendant is the only party with first-hand knowledge of the existence or nonexistence of a fact essential to the plaintiff's case (such as defendant's state of mind when the allegedly wrongful act occurred) and the defendant denies the existence of that fact by way of affidavit, plaintiff may show that there is indeed a factual dispute by confronting the defendant at a deposition with evidence casting doubt upon the truth of the denial. Any evasive testimony given by defendant as well as any other impeaching circumstantial evidence (frequently obtained through discovery) may be submitted in opposition to the summary judgment motion. *Cf. Forsblad v. Jepson*, 292 Minn. 458, 195 N.W.2d 429 (1972) (*per curiam*) (denial by defendant that he had notice of alleged fraud not sufficiently impeached by depositions to justify denial of summary judgment).

37. See *Walters v. City of Ocean Springs*, 626 F.2d 1317, 1321 (5th Cir. 1980); *Lamb's Patio Theater, Inc. v. Universal Film Exch.*, 582 F.2d 1068, 1071 (7th Cir. 1978); *Beckers v. International Snowmobile Indus. Ass'n*, 581 F.2d 1308, 1311 (8th Cir. 1978), *cert. denied*, 440 U.S. 986 (1979); *Willmar Poultry Co. v. Norton-Norwich Prods., Inc.*, 520 F.2d 289, 297 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976).

38. This is the case with respect to affidavits that must be made on personal knowledge. See notes 30-31 *supra* and accompanying text. The fruits of discovery may not always qualify as admissible evidence. However, because interrogatory answers and a party's depositions are made under oath, MINN. R. CIV. P. 30.03, 31.02, 33.01(4), and admissions are deemed binding, *id.* 36.02, the fruits of these discovery devices may be

tion is sufficient to establish—absent conflicting evidence—the existence or nonexistence of a crucial fact, the party opposing the motion must demonstrate at this pretrial stage what evidence he would present at trial to justify a contrary conclusion.³⁹ To be successful at trial, the opposing party would be required to present this evidence or face certain defeat. If the opposing party is unable to show the evidence exists at this pretrial stage, notwithstanding the available discovery devices, he should not be permitted to put the court and moving party through the time and expense of further litigation based on what can only be seen as speculation that some favorable evidence may surface. Thus, summary judgment can be viewed as the time the opposing party must “show his cards,” if in fact he has any, to justify further expenditure of time, money, and judicial resources.

III. THE EFFECT OF THE BURDEN OF PROOF

The discussion in Part II illustrates that proof in support of and in opposition to a summary judgment motion is essentially equivalent to that which the parties anticipate presenting at trial,

deemed admissions by a party opponent pursuant to MINN. R. EVID. 801(d)(2). When the deposition of a nonparty is used in support of or in opposition to a summary judgment motion and does not reflect first-hand knowledge or contains hearsay, it can be argued that such testimony should be given weight when it supports a contention that there is no evidence to support a given factual allegation. If a party against whom such a contention is made does not proffer counterproof, his failure to do so coupled with such deposition statements would be strong indicators that the factual allegation cannot be proved. The use of such deposition testimony to establish the *existence* of a fact on motion for summary judgment, however, may be more questionable. A heavy burden of proof may appropriately be placed upon a party attempting to show the *existence* of a fact on a summary judgment motion while it would be inappropriate to impose a heavy burden on one attempting to establish the nonexistence of a fact. *See* text accompanying notes 40-43 *infra*.

39. *Dunnell Minnesota Digest* suggests that the standard of proof on motion for summary judgment is substantially equivalent to that required for a directed verdict. *See* 10A DUNNELL MINNESOTA DIGEST § 4988b, at 266-67 & nn.32-33 (3d ed. 1971 & 1980 Cum. Supp.). None of the Minnesota cases cited by *Dunnell*, however, directly support the proposition that the standards are precisely equivalent. The text of this Article purposefully states a more vague standard regarding the showing the moving party must make before the opposing party is required to respond or have judgment rendered against him. One contention of this Article is that, as a practical matter, a less stringent standard of proof properly is imposed on the moving party in some summary judgment contexts. *See* Part III *infra*. One commentator supports the proposition that the burden should be on the party opposing the motion to show he could avoid a directed verdict against him at trial as opposed to requiring the moving party to show he would be entitled to one. *See* Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72, 79 (1977); *cf.* *California Computer Prods. v. International Business Machs. Corp.*, 613 F.2d 727, 732-34 (9th Cir. 1979) (context in which motion is made has bearing on determining burden of moving party).

at least with respect to those issues deemed dispositive on the motion. Therefore courts should be particularly sensitive to which party has the burden of proof on dispositive issues at trial. Judicial sensitivity to the burden of proof can lead to justifiable distinctions in the application of the summary judgment rule.

Consider, for example, the hypothetical case discussed above, in which facts *B* and *C*, both essential elements of plaintiff's claim, and also fact *D*, the basis of defendant's affirmative defense, are in dispute. If plaintiff is attempting to establish conclusively the existence of facts *B* and *C*, or defendant is attempting to establish conclusively the existence of fact *D*, corresponding to the burden of proof each will have at trial, the application of a strict summary judgment standard that imposes a heavy burden on a moving party may be appropriate. For a directed verdict to be granted in this context at trial, the supporting evidence would have to be so strong that no fact-finder could reasonably find these facts not to exist.⁴⁰ Accordingly, on a motion for summary judgment in this context, if differing inferences may be drawn from the supporting evidence—even when completely unopposed by impeaching evidence—or if the party opposing the motion submits any evidence that casts doubt on the moving party's otherwise conclusive showing or credibility, it is reasonable to give the party opposing the motion every benefit of the doubt and allow the case to go to trial.

If the summary judgment motion is made when the moving party will *not* have the ultimate burden of proof on the dispositive issue, one commentator has argued cogently that a strict summary judgment standard should not be used.⁴¹ Returning to the hypothetical case, assume the defendant is making the motion by asserting the nonexistence of facts *B* or *C*, or plaintiff, after defendant has admitted the existence of facts *B* and *C*, is asserting the nonexistence of fact *D*. In these situations, a relaxation of the burden of proof required to sustain the motion is justified. Because it is more difficult to prove conclusively the nonexistence of a fact than it is

40. See *Lakehead Constructors, Inc. v. Roger Sheehy Co.*, 304 Minn. 175, 178, 229 N.W.2d 514, 515 (1975); *Carlson v. Rand*, 275 Minn. 272, 276, 146 N.W.2d 190, 193 (1966); *Coleman v. Huebener*, 269 Minn. 198, 203, 130 N.W.2d 322, 325 (1964); *Webster v. St. Paul City Ry.*, 241 Minn. 515, 519, 64 N.W.2d 82, 85 (1954); *Campion v. City of Rochester*, 202 Minn. 136, 139, 277 N.W. 422, 423 (1938); *Eichhorn v. Lundin*, 172 Minn. 591, 594, 216 N.W. 537, 538 (1927).

41. See Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 748-59 (1974).

to prove its existence,⁴² placing the burden of conclusively proving the nonexistence of a fact on the moving party seems unreasonable on its face. In addition, the party *opposing* the motion will have to prove the existence of the challenged fact at trial. If the moving party has presented any evidence, even if circumstantial, that the party opposing the motion will not be able to prove the existence of that fact at trial and the opposing party, having all discovery devices available to him, fails to present any evidence from which a fact-finder might reasonably find the challenged fact to exist, there can be no justifiable reason for the litigation to continue. The party opposing the motion has had the opportunity to obtain the necessary evidence, and by not obtaining and presenting it, he should be deemed to have admitted its nonexistence and have judgment rendered against him.⁴³

The logical result of this analysis is that courts should be more inclined toward imposing a less strict standard of proof when a summary judgment motion is made by one seeking to negate the existence of a fact essential to his opponent's case. The party opposing the motion, who will have the burden of establishing that fact at trial, should be required to offer tangible evidence of his ability to eventually sustain the burden of proof after the moving party has submitted evidence suggesting the contrary. Generally the party with the burden of proof will be more likely to have knowledge of the location of witnesses, if any, who could supply affidavits supporting the existence of necessary facts.⁴⁴ Even if this is not the case, the party opposing the motion would eventually be required to use discovery to obtain this necessary evidence.⁴⁵ If that party is either unwilling or unable to obtain the evidence at the summary judgment stage, there is no point in allowing the litigation to proceed through a needless trial to a directed verdict. Fairness demands that trials of other litigants not be delayed by

42. See C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 337, at 788 (2d ed. E. Cleary 1972) ("If proof of the facts is inaccessible or not persuasive, it is usually fairer to act as if the exceptional situation did not exist and therefore to place the burden of proof and persuasion on the party claiming its existence.").

43. Cf. California Computer Prods., Inc. v. International Business Machs. Corp., 613 F.2d 727 (9th Cir. 1979). The court stated:

Although the district court may direct a verdict either against the party who does not bear the burden of persuasion or the party who does bear that burden, the amount of evidence required for a directed verdict differs. *The party seeking a directed verdict must make a stronger showing of evidence if he bears the burden of persuasion.* *Id.* at 733 n.2 (emphasis added).

44. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.8, at 251-52 (2d ed. 1977).

45. See notes 33-37 *supra* and accompanying text.

frivolous matters and that the moving party not be subjected to the time and expense of litigating a nonmeritorious claim or defense.

IV. THE PARADIGM CASES

To examine further the utility of the approach to summary judgment in Part III, it will be helpful to discuss its application in the context of four paradigm situations in which motions for summary judgment typically are made. These four paradigms are as follows:

1. Motion by defendant seeking to negate an essential element of the plaintiff's claim.
2. Motion by plaintiff seeking to negate the affirmative defenses alleged by defendant when the basic allegations underlying plaintiff's claim are admitted.
3. Motion by defendant seeking to establish conclusively the existence of a valid affirmative defense.
4. Motion by plaintiff seeking to establish conclusively the existence of a claim.

Not all cases dealing with summary judgment motions arise in these precisely delineated contexts.⁴⁶ A number of Minnesota cases, however, do fit these categories. Combinations, of course, exist. For example, a plaintiff bringing a motion of the type described in paradigm four, seeking to establish conclusively the existence of a claim, may also, as part of the motion, be required to negate affirmative defenses that are raised by the defendant. Therefore, a court deciding the motion would have to analyze the case both in terms of paradigms two and four. This should not,

46. The paradigm cases generally would not encompass situations in which both parties stipulate that there is no genuine issue of material fact and that only a question of law is presented. The case of *Rossman v. 740 River Drive*, 308 Minn. 134, 241 N.W.2d 91 (1976), in which the parties stipulated the facts, however, may be an exception because it may be properly analyzed as a paradigm three case. For a discussion of *Rossman*, see notes 5-8 *supra* and notes 73-77 *infra* and accompanying text. For a discussion of district court judges' responses to questions regarding the extent of their review of the record when the parties have stipulated the facts, see note 12 *supra*.

In addition, the analysis in Part III may not be applicable to cases that entail only an issue of law. For example, in *Stadler v. Cross*, 295 N.W.2d 552 (Minn. 1980), plaintiffs brought suit for negligent infliction of emotional distress resulting when they witnessed the injury of their child in an automobile accident. Summary judgment for defendant was affirmed on the grounds that plaintiffs were not within the "zone of danger." *Id.* at 555. The affirmance was not based on plaintiffs' failure to rebut defendant's showing, but on the court's ruling as a matter of law that persons not within the "zone of danger" may not recover for negligent infliction of emotional distress.

however, pose any extensive difficulties if the court clearly understands the allocation of the burden of proof between the parties.

Applying the analysis described in Part III, if there is no rebutting evidence, summary judgment appears to be more appropriate in paradigms one and two. In these contexts, the moving party normally seeks to negate the existence of a fact essential to the other party's case, a fact for which the other party has the ultimate burden of proof. That being the case, if the moving party presents un rebutted circumstantial evidence indicating the other party's inability to establish the challenged claim or defense at trial, summary judgment should be granted. If the opposing party does present contrary evidence, however, summary judgment should be denied if this contrary evidence would be sufficient to take the case to the jury.

If the case falls within paradigms three and four, in which the moving party is seeking to establish the conclusiveness of a fact for which he has the eventual burden of proof at trial, courts may be justified in looking more closely at the supporting documents, even if they are uncontradicted. The possibility of granting the motion in paradigm three and four cases, however, is not foreclosed.

V. THE MINNESOTA CASES

In the past few years a number of cases fitting the paradigm situations noted in Part IV have been decided by the Minnesota Supreme Court. Although the court frequently has stated that the moving party has the burden of demonstrating clearly the nonexistence of a genuine issue of material fact,⁴⁷ analysis of these recent Minnesota decisions indicates that the practical extent of that burden and the focus and emphasis of the court differs depending on which of the four paradigms the case seems to fit.⁴⁸ The court did not analyze these cases along the lines suggested above. The results of the court's decisions, however, generally are consistent with the results under the analysis suggested in this Article. In virtually all recent paradigm one and two cases in which the party opposing the motion failed to present substantial evidence to establish the

47. *See, e.g.*, *Lowry Hill Properties, Inc. v. Ashbach Constr. Co.*, 291 Minn. 429, 439-40, 194 N.W.2d 767, 774 (1971); *Ahlum v. Rooney*, 274 Minn. 259, 262-63, 143 N.W.2d 65, 68 (1966); *Sauter v. Sauter*, 244 Minn. 482, 484-85, 70 N.W.2d 351, 353 (1955).

48. In preparation for this Article the author reviewed all summary judgment decisions by the Minnesota Supreme Court from 1971 to the present because these cases were thought to reflect present views of the members of the Minnesota Supreme Court.

existence of a fact challenged by the motion, summary judgment was granted and affirmed. In contrast, decisions affirming summary judgment in the contexts of paradigms three and four have been more difficult to obtain.⁴⁹

Sixteen cases that appear to fit within paradigm one⁵⁰ and two

49. See notes 50-84 *infra* and accompanying text.

One drawback in using only supreme court decisions for the analysis in this Article is that the large number of lower court decisions granting or denying motions for summary judgment is not represented. See note 19 *supra*. See generally 3 D. MCFARLAND & W. KEPPEL, *supra* note 1, § 1659, at 251-52. The supreme court cases, however, reflect how these motions should be handled by the lower courts.

50. See *Town Bd. v. City Council*, 298 N.W.2d 353 (Minn. 1980) (suit to restrain Hastings City Council from publishing or filing proposed ordinance until hearing before Minnesota Municipal Board; summary judgment for defendant affirmed because plaintiff failed to file written objection to ordinance within time limitation necessary to invoke jurisdiction of Minnesota Municipal Board); *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288 (Minn. 1980) (suit to enjoin enforcement of statute; summary judgment for plaintiff reversed on grounds that essential elements of claims had not been shown; reversal as opposed to remand indicates summary judgment was entered for defendant on same grounds); *Johnson v. AID Ins. Co.*, 287 N.W.2d 663, 665 (Minn. 1980) (declaratory judgment action on insurer's duty to defend; summary judgment for defendant affirmed when plaintiff failed to produce evidence showing damage suit against insured was within scope of coverage); *Delgado v. Lohmar*, 289 N.W.2d 479 (Minn. 1979) (negligence suit on theory of joint enterprise; summary judgment for defendants affirmed in part when evidence indicated lack of equal rights to direct and govern mutual undertaking and plaintiff failed to submit any counterproof on the issue; summary judgment reversed, however, on issue of individual negligence); *Eakman v. Brutger*, 285 N.W.2d 95, 97 (Minn. 1979) (injunction sought to restrain building of stadium; summary judgment affirmed when defendant supplied court with "affidavits and documents on each factual question raised by the complaint" and no counterproof was submitted); *Betlach v. Wayzata Condominium*, 281 N.W.2d 328, 330 (Minn. 1979) (suit for specific performance of alleged contract; summary judgment for defendant on finding of no contract reversed when supreme court found valid offer and acceptance); *City of Marshall v. Public Employees Retirement Ass'n*, 310 Minn. 489, 493-94, 246 N.W.2d 572, 575-76 (1976) (suit to enjoin certification that city owed sums to retirement association pursuant to statute; summary judgment affirmed when defendant's affidavits, taken to be true, entitled defendant to judgment as matter of law and plaintiff failed to allege specific facts in response); *Zappa v. Fahey*, 310 Minn. 555, 558, 245 N.W.2d 258, 260-61 (1976) (*per curiam*) (vicarious liability suit against purported owner of automobile; summary judgment for defendants affirmed because ownership of automobile was negated by affidavits and other supporting documents); *Lidstrom v. Mundahl*, 310 Minn. 1, 4-5, 246 N.W.2d 16, 18 (1976) (declaratory judgment action to determine rights in farm land; summary judgment for defendant affirmed when written agreements between parties contained unambiguous and integrated expression of parties' intentions and plaintiff could not introduce parol evidence); *Beier v. Dresbach*, 304 Minn. 545, 546, 229 N.W.2d 17, 17-18 (1975) (*per curiam*) (dramshop action; summary judgment for defendant affirmed when affidavits and depositions did not support reasonable inference that any of defendants illegally furnished intoxicating liquor); *Rice v. Forby*, 304 Minn. 23, 27-28, 228 N.W.2d 581, 584 (1975) (tort claim by business invitee; summary judgment for defendants affirmed when stipulated facts gave no indication of preexisting defective condition and plaintiff submitted no further evidence); *Fleming Sheet Metal, Inc. v. Leifco Realty Co.*, 300 Minn. 312, 313, 219 N.W.2d 620, 621 (1974) (*per curiam*)

cases that appear to fit within paradigm two⁵¹ have been rendered by the Minnesota Supreme Court during the past decade. With the exception of one 1971 negligence case,⁵² in all those cases in which the party opposing the motion apparently did not submit any counterevidence, summary judgment was affirmed by the court.⁵³ After the moving party has made what might be called a

(action to recover money on agency theory; partial summary judgment for defendant affirmed when evidence before court gave no basis for plaintiff's claim of agency relationship); *Manpower, Inc. v. Best Temporaries, Inc.*, 293 Minn. 369, 370-71, 196 N.W.2d 288, 290 (1972) (per curiam) (action to enjoin former employee from breach of covenant not to compete; summary judgment for plaintiff on counterclaims affirmed when depositions indicated defendants had no tangible proof of allegations made in counterclaims); *Forsblad v. Jepson*, 292 Minn. 458, 460, 195 N.W.2d 429, 430 (1972) (per curiam) (action based on notice to defendant of alleged fraud of codefendant; summary judgment for defendant affirmed when defendant denied knowledge of fraud and plaintiff set forth no facts questioning defendant's credibility); *Dempsey v. Jaroscak*, 290 Minn. 405, 408-10, 188 N.W.2d 779, 783 (1971) (personal injury suit; summary judgment for defendant reversed because reasonable minds could differ whether deposition testimony of plaintiff and photographs of accident scene showed breach of duty by defendants); *Lowry Hill Properties, Inc. v. Ashbach Constr. Co.*, 291 Minn. 429, 439-40, 194 N.W.2d 767, 774 (1971) (negligence action; summary judgment for defendant reversed when plaintiff gave offer of proof of actual negligent conduct); cf. *Davis v. Boise Cascade Corp.*, 288 N.W.2d 680, 683-84 (Minn. 1979) (suit for wrongful discharge from employment; summary judgment for defendant affirmed when plaintiff showed no excuse for failure to exhaust administrative remedies available under collective bargaining agreement). *Davis* can be characterized as a paradigm one or paradigm three case because it can be argued that defendant established a valid affirmative defense, a paradigm three case, or alternatively that plaintiff failed to show an avoidance to this defense. Assuming this avoidance could be deemed an "essential element" of plaintiff's case, this analysis would result in characterizing *Davis* as a paradigm one case.

51. See *Newland v. Overland Express, Inc.*, 295 N.W.2d 615 (Minn. 1980) (truck driver brought tort claim against lessor and lessee of tractor truck in which he was injured; lessee claimed truck driver was employee and therefore covered by Workers' Compensation Act; partial summary judgment for plaintiff affirmed, striking defendant's asserted defenses); *Vandeputte v. Soderholm*, 298 Minn. 505, 509-10, 216 N.W.2d 144, 147 (1974) (action on promissory note; summary judgment for plaintiff affirmed when defense of fraud was offered but depositions, affidavits, and interrogatories of defendants gave no evidence of fraud). In *Newland*, defendant's evidence of control over plaintiff was not sufficient to establish an employer-employee relationship that would make the Workers' Compensation Act applicable, 295 N.W.2d at 618; defendant failed to show consent to the alleged special employment relationship which, if shown, might establish an affirmative defense under the loaned servant doctrine, *id.*; and defendant failed to establish the defense of election of remedies, *id.* at 619-20.

52. *Dempsey v. Jaroscak*, 290 Minn. 405, 188 N.W.2d 779 (1971).

53. See *Town Bd. v. City Council*, 298 N.W.2d 353, 356 (Minn. 1980); *Johnson v. AID Ins. Co.*, 287 N.W.2d 663, 665 (Minn. 1980); *Eakman v. Brutger*, 285 N.W.2d 95, 97 (Minn. 1979); *City of Marshall v. Public Employees Retirement Ass'n*, 310 Minn. 489, 493-94, 246 N.W.2d 572, 575-76 (1976); *Zappa v. Fahey*, 310 Minn. 555, 558, 245 N.W.2d 258, 260-61 (1976) (per curiam); *Lindstrom v. Mundahl*, 310 Minn. 1, 4-5, 246 N.W.2d 16, 18 (1976); *Beier v. Dresbach*, 304 Minn. 545, 546, 229 N.W.2d 17, 17-18 (1975) (per curiam); *Rice v. Forby*, 304 Minn. 23, 27-28, 228 N.W.2d 581, 584 (1975); *Fleming Sheet*

prima facie showing of the other party's probable inability to prove an essential element of the case, the focus of the court has not been on the strength of the moving party's evidence, but rather on the lack of supporting evidence proffered by the party opposing the motion.⁵⁴ In several of these cases, the court reviewed the documents submitted on the motion and concluded that the evidence failed to meet the standard of proof required for the party opposing the motion to prevail at trial.⁵⁵ The claim of the opposing party that the needed evidence may be obtained at a later date following discovery has fallen on deaf ears, making it clear that the time to obtain evidence is before a ruling on the motion.⁵⁶ Even when the basis of the motion is a simple unqualified sworn statement by the defendant, summary judgment has been affirmed in the absence of evidence tending to show a reasonable basis for questioning defendant's credibility.⁵⁷

In *Dempsey v. Jaroscak*,⁵⁸ the one case that appears to be inconsistent with this pattern, the court noted that summary judgment is

Metal, Inc. v. Leifco Realty Co., 300 Minn. 312, 219 N.W.2d 620 (1974) (per curiam); Vandeputte v. Soderholm, 298 Minn. 505, 509-10, 216 N.W.2d 144, 147 (1974); Manpower, Inc. v. Best Temporaries, Inc., 293 Minn. 369, 370-71, 196 N.W.2d 288, 290 (1972) (per curiam); Forsblad v. Jepson, 292 Minn. 458, 460, 194 N.W.2d 429, 430 (1972) (per curiam).

In three of the paradigm one cases, *see* note 50 *supra*, the parties opposing the motion appear to have produced or referred to evidence in opposition to the motion that the supreme court felt was sufficient to create a genuine issue of material fact. *See* Delgado v. Lohmar, 289 N.W.2d 479, 483 (Minn. 1979); Betlach v. Wayzata Condominium, 281 N.W.2d 328, 330 (Minn. 1979); Lowry Hill Properties, Inc. v. Ashbach Constr. Co., 201 Minn. 429, 439-40, 194 N.W.2d 767, 774 (1971). Notwithstanding that summary judgment was reversed, at least in part, in these cases, the focus of the court was similar to that taken in paradigm one and two cases in which the judgment was affirmed.

54. *See* notes 55-57, 62-63 *infra* and accompanying text.

55. *See, e.g.*, Newland v. Overland Express, Inc., 295 N.W.2d 615, 618-19 (Minn. 1980) (paradigm two case); Zappa v. Fahey, 310 Minn. 555, 558, 245 N.W.2d 258, 261 (1976) (per curiam) (paradigm one case); Beier v. Dresbach, 304 Minn. 545, 546, 229 N.W.2d 17, 18 (1975) (per curiam) (paradigm one case); Vandeputte v. Soderholm, 298 Minn. 505, 509-10, 216 N.W.2d 144, 147 (1974) (paradigm two case); Manpower, Inc. v. Best Temporaries, Inc., 293 Minn. 369, 370-71, 195 N.W.2d 288, 290 (1972) (per curiam) (paradigm one case).

56. *See* Manpower, Inc. v. Best Temporaries, Inc., 293 Minn. 369, 371, 195 N.W.2d 288, 290 (1972) (per curiam). The requirement that proof be obtained prior to a ruling on the motion is consistent with federal practice. *See, e.g.*, DeLong Corp. v. Raymond Int'l, Inc., 622 F.2d 1135, 1139-40 & n.5 (3d Cir. 1980) (affidavits submitted after summary judgment hearing need not be considered); Farina v. Mission Inv. Trust, 615 F.2d 1068, 1076 (5th Cir. 1980) (same).

57. *See* Forsblad v. Jepson, 292 Minn. 458, 460, 195 N.W.2d 429, 430 (1972) (per curiam).

58. 290 Minn. 405, 188 N.W.2d 779 (1971).

difficult to obtain in negligence cases,⁵⁹ and, in what may be a strained factual analysis, held that the facts proffered by the moving party could support differing conclusions on the negligence issue.⁶⁰ *Dempsey* is the only paradigm one or two case in which summary judgment was reversed in the absence of production of fairly significant counterevidence by the party opposing the motion. Because it was a negligence case, *Dempsey* may be somewhat sui generis.⁶¹

In general, however, it is the context of paradigm one or two cases in which the court has emphasized strongly the language in Rule 56 requiring the party opposing the motion to set forth "specific facts" to justify his opposition.⁶² When the opposing party has failed to do so, summary judgment routinely has been affirmed.⁶³ The focus of the court in these cases has been not on the strength of the moving party's evidence, but rather on the absence of substantial counterevidence by the party opposing the motion. Therefore, it appears that the clearest cases for the propriety of summary judgment exist in the context of paradigms one and two. This is true at least when the moving party has reason to believe, as a result of discovery or otherwise, that the opposing party will not be able to produce convincing evidence in opposition to the motion.

In cases involving paradigms three and four,⁶⁴ in which the moving party will have the burden of proof on the dispositive issue or issues at trial, the picture is not nearly so clear. In these contexts, apparently conflicting cases abound, and the moving party's heavy burden is emphasized. For example, four cases decided in the previous decade involved summary judgment motions based

59. See *id.* at 407, 188 N.W.2d at 781.

60. See *id.* at 408, 188 N.W.2d at 783.

61. See 2 J. HETLAND & O. ADAMSON, MINNESOTA PRACTICE 574 (1970). The authors state that "[i]ssues of negligence and proximate cause are seldom matters capable of determination of a Rule 56 summary judgment motion. The legal standards of reasonableness and causation are uniquely jury functions." *Id.* But see *Beier v. Dresbach*, 304 Minn. 545, 546, 229 N.W.2d 17, 17-18 (1975) (per curiam) (affirming summary judgment for defendants in dramshop case); *Rice v. Forby*, 304 Minn. 23, 27-28, 228 N.W.2d 581, 584 (1975) (summary judgment for defendants sustained in negligence suit).

62. See, e.g., *Eakman v. Brutger*, 285 N.W.2d 95, 97 (Minn. 1979) (paradigm one case); *City of Marshall v. Public Employees Retirement Ass'n*, 310 Minn. 489, 494, 246 N.W.2d 572, 575 (1976) (paradigm one case); *Rice v. Forby*, 304 Minn. 23, 27-28, 228 N.W.2d 581, 584 (1975) (paradigm one case); *Vandeputte v. Soderholm*, 298 Minn. 505, 509, 216 N.W.2d 144, 147 (1974) (paradigm two case).

63. See note 62 *supra*.

64. See notes 65-84 *infra* and accompanying text.

on the affirmative defenses of collateral estoppel and res judicata, paradigm three situations.⁶⁵ These cases illustrate the moving party's heavy burden. In two of these cases in which summary judgment was affirmed, the court set forth in some detail the history and rationale of the prior judgments.⁶⁶ In the two cases in which summary judgment was reversed it is arguable that the focus of the court was on the failure of the moving party to negate potential counterarguments to the res judicata defense.⁶⁷ In *Hauser v. Mealey*,⁶⁸ the court noted that in the previous action the orders denying plaintiff's requested relief were unaccompanied by memoranda setting forth the grounds for the order.⁶⁹ As a result, it was unclear what issues could be given collateral estoppel effect and, therefore, plaintiff was given the opportunity to relitigate the matter.⁷⁰ In *Amalgamated Meat Cutters & Butcher Workmen v. Club 167, Inc.*,⁷¹ the court was unable to ascertain from the record whether the claim in the second action was identical to that raised in the first, placing on the defendant the burden of clearly establishing that the claims were identical. The implication of these cases is that a party moving for summary judgment on the ground of res judicata must offer detailed proof that the defense is valid, regardless of the lack of any counterproof or counterarguments raised by

65. See notes 66-72 *infra* and accompanying text.

66. See *Goblirsch v. Western Land Roller Co.*, 310 Minn. 471, 477-80, 246 N.W.2d 687, 691-92 (1976) (summary judgment for defendant affirmed because plaintiff was collaterally estopped by prior verdict); *Kelly v. Kelly*, 304 Minn. 237, 241-42, 229 N.W.2d 526, 529 (1975) (summary judgment for defendant affirmed because maintenance of action would constitute collateral attack upon lower court order).

67. See *Hauser v. Mealey*, 263 N.W.2d 803, 809 (Minn. 1978) (summary judgment for defendant reversed because lower court decision did not have res judicata effect and relitigation of issues was not precluded by doctrine of collateral estoppel); *Amalgamated Meat Cutters & Butcher Workmen v. Club 167, Inc.*, 295 Minn. 573, 574-75, 204 N.W.2d 820, 821 (1973) (per curiam) (summary judgment for defendant reversed on ground of res judicata).

68. 263 N.W.2d 803 (Minn. 1978) (action for reformation of deeds, breach of contract, and fraud).

69. *Id.* at 809.

70. *Id.* The *Hauser* court relied on the following statement:

[I]f the judgment might have been based upon one or more of several grounds, but does not expressly rely upon any one of them, then none of them is conclusively established under the doctrine of collateral estoppel, since it is impossible for another court to tell which issue or issues were adjudged by the rendering court.

Id. at 808 (quoting 1B J. MOORE, FEDERAL PRACTICE ¶ 0.443[1], at 3915 (2d ed. 1974)).

71. 295 Minn. 573, 204 N.W.2d 820 (1973) (per curiam) (equity action to restrain defendants from disposing of or spending certain funds and obtain judgment declaring plaintiffs as owners of the funds).

the party opposing the motion.⁷²

Cases dealing with other affirmative defenses seem to breed confusion. Two recent cases have involved summary judgment motions based on exculpatory or liability-limiting contractual provisions. In *Rossman v. 740 River Drive*,⁷³ which was discussed earlier, the court held that before determining the validity of a lease provision that exculpates the landlord for negligent acts, the facts giving rise to the injury would have to be shown more specifically.⁷⁴ The court appeared to place on the *moving* party the obligation to negate the existence of any facts that could support a holding that the exculpatory clause was unenforceable as a matter of public policy under the circumstances of the case.⁷⁵ In *Morgan Co. v. Minnesota Mining & Manufacturing Co.*,⁷⁶ however, the court indicated that the facts in the record had "not persuaded" the court that the liability-limiting provision was unconscionable or against public policy. The language in *Morgan* indicates that the *nonmoving* party may have the burden to come forth with facts justifying a finding of legal nonenforceability. In this sense, the *Morgan* and *Rossman* decisions appear inconsistent. At the least, however, *Rossman* indicates that a party moving for summary judgment based on exculpatory or liability-limiting contractual provisions should be thorough in preparing supporting documentation to negate any anticipated factual circumstances that may avoid the validity of the defense, even though the opposing party may fail to make the anticipated challenge.⁷⁷

Even when a release is the affirmative defense, the court empha-

72. See *Brown v. State Auto. & Cas. Underwriters*, 293 N.W.2d 822 (Minn. 1980). *Brown* is a paradigm four case. Plaintiff brought a declaratory judgment action on insurer's duty to defend and indemnify plaintiff for damages awarded in a prior suit. *Id.* at 824. The insurer argued that plaintiff's actions creating liability were intentional and therefore excluded from coverage. *Id.* On appeal, summary judgment for plaintiff on the duty to indemnify was reversed because the issue of intent to injure, on which plaintiff's summary judgment motion in the present case was based, was not necessary to the result in the previous case. *Id.* at 825. Summary judgment for plaintiff on the issue of insurer's duty to defend was affirmed, however, on the theory that "[i]f any part of the claim is arguably within the scope of coverage afforded by the policy, the insurer should defend and reserve its right to contest coverage based on facts developed at trial." *Id.* at 825-26.

73. 308 Minn. 134, 241 N.W.2d 91 (1976); see notes 5-8 *supra* and accompanying text.

74. See 308 Minn. at 137-38, 241 N.W.2d at 93.

75. See *id.*

76. 310 Minn. 305, 246 N.W.2d 443 (1976).

77. Professor Louis argues that requiring the movant to establish the nonexistence of a potential avoidance of affirmative defenses, which arguably is required by *Rossman* and the cases dealing with release defenses, see notes 78-82 *infra* and accompanying text, places an undue burden on the movant and would require the party opposing the motion to

sizes the moving party's extensive burden. In *Schmidt v. Smith*,⁷⁸ the court noted that summary judgment may be appropriate when the supporting evidence shows execution of the release under circumstances evincing basic fairness, and both parties clearly indicate in the instrument an intent to release all claims for known and unknown injuries.⁷⁹ The *Schmidt* court appeared to place the burden of proving the release and "fair surrounding circumstances" on the moving defendant. In a later decision, *Barilla v. Clapshaw*,⁸⁰ the defendant submitted an extensive affidavit showing the circumstances surrounding the execution of the release. The *Barilla* court, however, unlike the *Schmidt* court, noted specifically that the nonmoving plaintiff had failed to demonstrate a genuine issue of fact precluding enforcement of the release, for example, lack of "fair surrounding circumstances."⁸¹ The *Schmidt* and *Barilla* decisions do not resolve how much proof is required of the defendant before the plaintiff must respond or lose the motion. Notwithstanding the resulting confusion regarding the extent of the defendant's required showing, it seems clear that something more than a prima facie proof of a defense—the release itself—is required for the moving party to be successful under these circumstances, even in the absence of any responsive showing by plaintiff.⁸²

Many other Minnesota cases emphasize the heavy burden of proof imposed on the moving party in the context of paradigms three and four.⁸³ In the few paradigm three and four cases in

respond with proof establishing at least the prima facie existence of an avoidance. *Louis*, *supra* note 41, at 747 n.11.

78. 299 Minn. 103, 216 N.W.2d 669 (1974).

79. *See id.* at 109, 215 N.W.2d at 673-74.

80. 306 Minn. 437, 237 N.W.2d 830 (1976).

81. *Id.* at 440-41, 237 N.W.2d at 831-32.

82. Two other recent cases dealing with the affirmative defense of release are consistent with the notion that a defendant's burden in summary judgment motions based on a release is substantial. *See Eddy v. Republic Nat'l Life Ins. Co.*, 290 N.W.2d 174, 177 (Minn. 1980) (summary judgment for defendant, on ground that he was agent of codefendant who had settled plaintiff's claim, reversed because defendant's status as agent had not been established); *Anders v. Dakota Land & Dev. Co.*, 289 N.W.2d 161, 163-64 (Minn. 1980) (summary judgment for defendant reversed on ground that although principal of defendants had been released from liability, record did not establish as a matter of law that individual defendants could not be found independently liable as well).

83. *See, e.g., Lewis v. Ford Motor Co.*, 282 N.W.2d 874, 877 (Minn. 1979) (employment discrimination suit; motion based on statute allowing affirmative defense of serious threat to health and safety of disabled worker; summary judgment for defendant reversed when supporting evidence disclosed past disability but not substantial evidence establishing that workplace constituted present threat to plaintiff's health); *Harrington v. County*

which summary judgment was affirmed, extensive documentation usually was submitted in support of the motion and typically no counterevidence was submitted.⁸⁴ This is in sharp contrast to cases

of Ramsey, 279 N.W.2d 791 (Minn. 1979) (medical malpractice claim; summary judgment based on statute of limitations reversed when evidence of continuing pattern of serious mental illness was sufficient to create fact issue regarding plaintiff's insanity; statute of limitations tolled); All Am. Foods, Inc. v. County of Aitkin, 266 N.W.2d 704, 705-06 (Minn. 1978) (per curiam) (suit for interference with plaintiff's land; summary judgment for defendants reversed on basis that title to property was not essential when plaintiff was in continued possession of property) (case arguably falls within paradigm one because defendants argued that plaintiff was not a proper party in interest); Corwine v. Crow Wing County, 309 Minn. 345, 361-62, 244 N.W.2d 482, 491 (1976) (action to compel issuance of special permitted use permit and planned unit development permit for campground; summary judgment for plaintiff reversed when record raised facts from which county board could find a legally sufficient reason for revocation of the previously issued permit); Cobb v. City of Willmar, 308 Minn. 462, 463-64, 242 N.W.2d 83, 84 (1976) (per curiam) (action against city for demolition of house and garage; summary judgment for defendant city reversed when question existed whether plaintiff was occupant of property) (case arguably falls within paradigm one because defendant argued plaintiff could not show entitlement to property); Federal Ins. Co. v. Pratt's Express, 308 Minn. 282, 284, 241 N.W.2d 488, 489 (1976) (per curiam) (subrogation action by insured; summary judgment for defendant reversed when affirmative defense was based on affidavit merely expressing conclusion); Vang v. Mount, 300 Minn. 393, 400-01, 220 N.W.2d 498, 502-03 (1974) (declaratory judgment action seeking determination that sand, gravel, and limestone were not subject to mineral rights reservation; summary judgment for plaintiffs reversed when language of mineral rights reservation was ambiguous leaving genuine fact issues for the court); Roderick v. Lull Eng'r Co., 296 Minn. 385, 389-90, 208 N.W.2d 761, 764 (1973) (action against employer for commission or bonus payments; summary judgment for defendant reversed when defense of accord and satisfaction was raised and depositions in support of motion did not show clearly that payments made were intended to be full payment of plaintiff's claims); Morgan v. Tara Mut. Fire Ins. Co., 293 Minn. 423, 424-25, 196 N.W.2d 630, 632 (1972) (per curiam) (action on fire insurance policy; summary judgment for plaintiff reversed when numerous issues of material fact not clearly negated by materials submitted in support of motion).

84. See, e.g., Worwa v. Solz Enterprises, Inc., 307 Minn. 490, 238 N.W.2d 628 (1976) (per curiam) (suit for money allegedly due under oral contract; summary judgment for defendant affirmed when affirmative defenses based on statute of frauds and statute of limitations were held sufficient in light of plaintiff's deposition testimony); St. Cloud Nat'l Bank & Trust Co. v. Sobania Constr. Co., 302 Minn. 71, 74-76, 224 N.W.2d 746, 748-49 (1974) (per curiam) (action to recover money advanced against a check; affirmed summary judgment for plaintiff who submitted documents in support of motion showing that check was obtained in usual course of business and defendant, aside from making claims of negligence, pointed to nothing indicating any lack of honesty or good faith by plaintiff) (case arguably falls within paradigm two); County of Hennepin v. Mikulay, 292 Minn. 200, 203-05, 194 N.W.2d 259, 261-62 (1972) (condemnation proceedings; summary judgment for plaintiff affirmed where numerous documents were submitted by plaintiff in support of motion and no counter-affidavits were submitted by defendant; court emphasized rules precluding opposing party from relying on pleadings or possible cross-examination at a later date).

An exception to this pattern involves cases in which an unambiguous contractual provision is the basis for the claim or defense and is asserted to be controlling as a matter of law on the summary judgment motion. In these cases, the party opposing the motion

involving paradigms one and two, in which the supporting documentation was comparatively scant and language emphasizing the moving party's heavy burden is noticeably absent. In practice, if not as a matter of stated policy, the Minnesota Supreme Court's handling of summary judgment cases differs in focus and approach depending on the context in which the motions are made. When the moving party contends that the opposing party will be unable to prove a fact that the opponent must prove to succeed at trial, the court generally focuses on the opposing party's burden of replying to this contention. Little attention is given to the moving party's burden of proof on the motion. It seems fair to conclude that in the context of paradigms one and two, the court has applied a less stringent standard regarding proof that the moving party must present to adequately support the motion than in the context of paradigms three and four, in which the moving party will have the burden of proof on the dispositive issue or issues at trial. In paradigm one and two cases, the burden on the moving party appears to be one of suggesting the probability that the party opposing the motion will not be able to establish a necessary fact for which the opposing party will ultimately have the burden of proof. Once this is done, the party opposing the motion must respond with sufficient counterproof or risk having judgment rendered against him. In paradigm three and four cases the burden of the moving party to establish clearly the nonexistence of genuine issues of material fact appears to have remained relatively intact.

may point to extensive evidence supporting his claim that the provision is not controlling, but the court has affirmed summary judgment in this context on several occasions notwithstanding arguments asserting that this extrinsic evidence should be considered. *See, e.g.*, *Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349 (Minn. 1979) (mortgage foreclosure action; summary judgment for mortgagee affirmed because contract was unambiguous and had been relied on for over a decade); *In re Turners Crossroad Dev. Co.*, 277 N.W.2d 364 (Minn. 1979) (action to delete certain restrictions from summary judgment for certificate of title; affirmed when all relevant evidence was before court and was undisputed); *Davis v. Boise Cascade Corp.*, 288 N.W.2d 680, 683 (Minn. 1979) (summary judgment affirmed for defendant on ground that plaintiff failed to exhaust administrative remedies required by collective bargaining agreement and presented no rebuttal evidence on validity of contractual requirement). *But see* *American Fed'n of State, County & Mun. Employees Local 66 v. St. Louis County Bd.*, 281 N.W.2d 166 (Minn. 1979) (action against county for unfair labor practice; summary judgment for defendant reversed on ground that dispute, to be resolved under contractual grievance procedure, was not within contractual or statutory definition of "grievance" and plaintiffs were thus not precluded from seeking a judicial remedy).

VI. CONCLUSION

Approaching summary judgment by application of the paradigm analysis outlined in this Article can be useful to both attorneys and courts. This analysis will provide the litigator with a means to determine whether there is sufficient likelihood of success to warrant the motion. If the motion is made, reference to the patterns of summary judgment decisions by the Minnesota Supreme Court may persuade the trial court, particularly in paradigm one and two cases, that the motion has merit and is likely to be affirmed on appeal. If the case falls within paradigms three or four, however, the attorney is forewarned of the relatively more difficult task of persuading the court that summary judgment is appropriate.

This analysis also will focus the court's attention on who will have the burden of proof on material issues at trial. If the party opposing the motion has not produced evidence showing a realistic chance of prevailing at trial, further expenditure of time, money, and judicial resources is unjustified. Assuming the Minnesota Supreme Court remains consistent in its approach, the lower court may grant summary judgment motions consonant with this analysis in greater confidence that the decision will be affirmed on appeal.

In proper application, use of the analysis of this Article should lead attorneys to make summary judgment motions in more appropriate contexts and thereby reduce unnecessary and expensive litigation at both the lower and appellate judicial levels.

APPENDIX: MINNESOTA SUMMARY JUDGMENT QUESTIONNAIRE

In August 1980 questionnaires on summary judgment were sent to fifty Minnesota district court judges and fifty Minnesota attorneys, all of whom were listed in the 1978-1979 Directory of the Section of Litigation of the American Bar Association.⁸⁵ Thirty-two judges and twenty-six attorneys responded.⁸⁶ This Appendix will summarize those responses in greater detail than was attempted in the text of this Article.⁸⁷

JUDGE'S FORM

Total Responses: 32 (22 "outstate"; 10 "metro")⁸⁸

J-1. To the extent generalizations can be made, what are your views on the utility of summary judgment in Minnesota?

- A. It is a very useful time-saving tool to weed out frivolous cases: 17.
- B. It has some utility in streamlining the litigation process, but not to the extent that I would deem it "very useful": 12.
- C. It is generally useless: 2 (both outstate).
- D. Other opinions or additional comments:

"It is a very useful time-saving tool to present questions of law and to eliminate some issues."

"Abused by some lawyers who make the motion automatically."

"Not frequently, however, but useful in cases where it fits." [Qualifying an affirmative response to "A."]

"And where there are no issues of fact—only issues of law." [Qualifying an affirmative response to "A."]

85. See [1978-1979] ABA THE SECTION OF LITIGATION DIRECTORY 138-44 (1978).

86. All questionnaires returned and a list of the attorneys and district court judges responding are on file at the William Mitchell Law Review office. To assure anonymity in response to this questionnaire, the identity of each respondent was removed from the questionnaire prior to tabulation.

Some of the attorneys and judges surveyed did not respond to every question. Accordingly, the total number of responses to each question may not always equal the number of questionnaires returned.

87. For a selective discussion of responses to the summary judgment questionnaire, see notes 9-21 *supra* and accompanying text. Respondents' comments quoted in this Appendix have been edited for grammatical consistency.

88. When the views of "outstate" and "metro" respondents differ significantly in response to a question, that difference will be noted parenthetically following the question. "Metro" respondents are those from Hennepin and Ramsey Counties. "Outstate" respondents are those residing in counties other than Hennepin and Ramsey.

"Is" is deleted and "could be" is inserted. [Qualifying an affirmative response to "A."]

- J-2. In general, how would you characterize the propriety of the use of the summary judgment rule by attorneys who appear before you?
- A. It is markedly overused and misused. Agree: 9 (50% of responding metro judges; 33% of responding outstate judges). Disagree: 19.
 - B. It is more often than not improperly claimed to justify relief. Agree: 20 (100% of responding metro judges; 62% of responding outstate judges). Disagree: 8.
 - C. It is usually asserted as a basis for relief only in appropriate cases. Agree: 9 (17% of responding metro judges; 40% of responding outstate judges). Disagree: 17.
 - D. It is frequently not invoked in cases where it should be invoked. Agree: 5. Disagree: 20.
 - E. Other general comments:
 - "It is a mixed bag. Probably in a majority of cases it is properly asserted with a significant minority inappropriately asserted."
 - "It is almost automatically used, whether appropriate or not."
- J-3. What do you believe are the motives for which attorneys normally make motions for summary judgment?
- A. To decrease the expense of litigation and avoid a needless trial (or to limit the issues in cases of partial summary judgment). Most of the time such motions are made: 12 (13% of responding metro judges; 50% of responding outstate judges). At least 50% of the time: 11 (38% of responding metro judges; 36% of responding outstate judges). Rarely: 7 (50% of responding metro judges; 14% of responding outstate judges). Never: 0.
 - B. To increase the ultimate expense of the litigation to their client and thereby primarily benefit themselves financially. Most of the time such motions are made: 1 (outstate). At least 50% of the time: 6 (50% of responding metro judges; 10% of responding outstate judges). Rarely: 21 (50% of responding metro judges; 81% of responding outstate judges). Never: 1.
 - C. To increase the expense of the litigation to their opponents. Most of the time such motions are made: 0. At least 50% of the time: 5 (38% of responding metro judges; 10% of responding outstate judges). Rarely: 22 (63% of responding metro judges; 81% of responding outstate judges). Never: 2 (both outstate).
 - D. To obtain information from their opponent which may be

- difficult to obtain under other procedural rules. Most of the time such motions are made: 1 (outstate). At least 50% of the time: 4 (33% of responding metro judges; 5% of responding outstate judges). Rarely: 20 (44% of responding metro judges; 76% of responding outstate judges). Never: 5.
- E. To avoid potential malpractice claims. Most of the time such motions are made: 0. At least 50% of the time: 6 (38% of responding metro judges; 14% of responding outstate judges). Rarely: 18 (50% of responding metro judges; 67% of responding outstate judges). Never: 5.
- F. To show their clients that they are "doing something." Most of the time such motions are made: 1 (metro). At least 50% of the time: 10 (44% of responding metro judges; 29% of responding outstate judges). Rarely: 14 (33% of responding metro judges; 52% of responding outstate judges). Never: 5.
- G. Other motives:
- "Probably to lay the groundwork with the trial judge for favorable rulings at trial and perhaps post trial."
 - "To test legal theories—to become to some extent educated on potentialities of a claim or defense."
 - "To increase the potential for settlement."
 - "To slow down the setting of a trial date."
 - "Pushing for case to settle and avoid trial and disposition."
 - "To resolve pretrial issues which cannot be mutually resolved."
- H. Please state whether any of the motives listed above are in your view more likely to be motives of attorneys representing plaintiffs or defendants. [Responses omitted because of ambiguity in question.]
- J-4. When attorneys for both sides of the litigation *stipulate* that there is no genuine issue of material fact and that the only question is one of law, which of the following statements, if any, would *generally* describe your initial view prior to more in-depth review of the case?
- A. That summary judgment is probably appropriate for someone. Agree: 26. Disagree: 3.
 - B. That notwithstanding these stipulations, summary judgment is just as likely to be inappropriate as appropriate. Agree: 4. Disagree: 21.
 - C. I intend to affirmatively examine the attorneys and the record in greater detail in order to determine whether they have overlooked any possible material fact issues. Agree: 13. Disagree: 12.
 - D. I generally accept these stipulations as true and do not

affirmatively look for potential factual issues the attorneys have not raised. Agree: 14 (67% of responding metro judges; 42% of responding outstate judges). Disagree: 14.

E. Other comments:

"I find it a rare but useful device to obtain a ruling from the court."

"I do lean towards the agreed upon position of the attorneys as a general rule."

"Many times fact questions arise because of the state of the law and further proof may be necessary."

- J-5. How would you categorize the attitude of other district judges you know regarding summary judgment? Please attempt to estimate a percentage for each category.

	<u>METRO</u>	<u>OUTSTATE</u>	<u>TOTAL</u>
Generally favorable to summary judgment.			
0%	2	1	3
1-25%	4	4	8
26-50%	0	2	2
51-75%	0	3	3
76-100%	0	2	2
Check marks	0	2	2
Generally unfavorable to summary judgment.			
0%	0	4	4
1-25%	0	2	2
26-50%	2	3	5
51-75%	2	3	5
76-100%	3	1	4
Check marks	0	4	4
Neutral.			
0%	2	3	5
1-25%	3	6	9
26-50%	1	2	3
51-75%	0	0	0
76-100%	0	1	1
Check marks	0	0	0

[Of the responding metro judges, none considered more than 25% of other judges to be "generally favorable" to summary judgment and none considered less than 25% of other judges to be "generally unfavorable" to summary judgment. The responses of the outstate judges were evenly divided between favorable, unfavorable, and neutral categories.]

- J-6. If you consider yourself generally unfavorable to summary judgment,

ment, which, if any, of the following reasons do you believe have led to that viewpoint?

- A. A desire to decide the case based on live testimony: 5.
- B. A high regard for jury determination of cases: 8.
- C. Attorneys often make such motions in inappropriate contexts: 7.
- D. A desire to give the parties the feeling that their case will be fully heard: 5.
- E. Fear of reversal: 1.
- F. Other reasons:

“Usually are fact questions for the jury.”

“A feeling that it’s quite unusual for a disagreement to ‘get to court’ without some disagreement as to the basic facts.”

“High regard” is deleted and “preference” is inserted. [Qualifying an affirmative response to “B.”]

“A fuller examination of more facts and seeing the witnesses, and the ability to question when certain facts are unclear.”

J-7. In general, how would you characterize decisions of the Minnesota Supreme Court on summary judgment?

- A. It reverses summary judgment more often than is warranted: 5.
- B. It affirms summary judgment more often than is warranted: 0.
- C. About right: 22.
- D. Other:

“Years ago ‘A’ occurred. With Justice Sheran’s ascent to the Minnesota Supreme Court, summary judgment is more sympathetically received.”

“Should clearly show that they support summary judgments.”

“NA except for appeals from my summary judgment orders.”

J-8. Of the other district judges you know who take a “conservative” approach to summary judgment and are generally inclined to deny such motions (*i.e.*, those judges included in the “unfavorable” category under question 5), what reasons do you think underlie such decisions?

- A. Fear of reversal. Most: 3. Over 50%: 4. Few: 12. None: 1.
- B. A desire to decide the case based on live testimony. Most: 3. Over 50%: 7. Few: 8. None: 1.
- C. High regard for jury determinations. Most: 2. Over 50%: 9. Few: 5. None: 1.

- D. A desire to give the parties the feeling that their case will be fully heard. Most: 5. Over 50%: 5. Few: 10. None: 0.
- E. Attorneys often make such motions in inappropriate cases. Most: 5. Over 50%: 8. Few: 7. None: 0.
- F. Other:

"Impossible to determine; however, I do not believe 'fear of reversal' is a likely motivation."

"Unwillingness to do the work and write a decision."

"So far as I know, judges are neutral and look for the right solution."

- J-9. How often do you read the supporting and opposing memoranda of the parties before deciding a summary judgment motion?
Always: 30. Usually: 2. Infrequently: 0. Never or Almost Never: 0.
- J-10. Approximately what percentage of summary judgment motions which have been made before you would you estimate you have granted?

0-10%:	10 (32%)
11-25%:	8 (26%)
26-50%:	7 (23%)
51-75%:	6 (19%)

- J-11. Do you believe attorneys in general have a sufficient understanding of the summary judgment rule so as to invoke it only in appropriate cases and to make pertinent (nonfrivolous) arguments regarding such motions?
 - A. The vast majority do: 10 (31%).
 - B. Over 50% do: 12 (38%).
 - C. Less than 50% do: 8 (25%).
 - D. Very few do: 2 (6%) (both metro).
- J-12. It has been asserted that many district judges have a tendency to deny summary judgment motions virtually as a matter of course. Based on your experience, do you think this assertion is accurate?
Yes: 11 (4 metro; 7 outstate). No: 20 (5 metro; 15 outstate).
- J-13. Other general comments:

"I would hope summary judgment motions could be properly used to expedite the disposition of mounting case loads."

"On many occasions I will defer the motion for summary judgment on one or more issues until trial because the case has to be tried anyway and I will have all the evidence before me when I rule. I take more time and go into it more thoroughly when the motion, if granted, will be dispositive of the entire case."

"In earlier years, say ten to fifteen years ago, some defense attorneys in auto negligence cases abused summary judgment motions. This occurs today much less frequently. Also law schools teach research better than in earlier years, consequently the younger crop of attorneys present summary judgment motions much better and more appropriately."

"Summary judgment is helpful in disposing of cases, but often is used as a delaying tactic and for discovery by attorneys. It has its place in the legal process, however, and I am not opposed to its use."

"Most lawyers do not recognize that summary judgment should rarely be granted—especially in tort cases. Nevertheless, the great bulk of such motions coming before me are in tort cases."

"Summary judgment is most frequently granted by myself and by other judges in the district where there are disputed issues of fact, but the facts are not 'material.' There is a significant number of cases in which plaintiffs assert a right to recovery merely because they have been damaged in some way, yet there is no legitimate legal basis for recovery. In these cases (of which there appears to be a growing number), summary judgment is used as the equivalent of a motion to dismiss for failure to state a claim on which relief can be granted. Even when motions for dismissal would have a fair chance of success, it appears that defense attorneys would rather by-pass that procedure, conduct some discovery, and then bring a motion for summary judgment. On the other hand, where there is a clearly cognizable legal claim or defense, I am reluctant to grant summary judgment. I believe that the practice in this district is to grant summary judgment motions very sparingly, both because of the spirit of Rule 56 and because of the supreme court's insistence on resolving all doubts against the motion. In general, I am aware of very little abuse of the summary judgment procedure, and I find the views underlying the questionnaire unnecessarily cynical."

"Summary judgments are granted only on such occasion where there is no fact issue to be determined and therefore it is granted sparingly as there is usually some fact issue for determination. However, motions for summary judgment do smoke out what the fact issues are as between the parties even though most motions for summary judgment are

denied. These motions are still a useful tool to dispose of cases in which there is no fact issue to be determined."

"Very useful—quite often precipitates agreement on facts, making trial unnecessary. Even a partial summary judgment will save trial time."

"The supreme court has an obvious policy of favoring trials and most summary judgment orders appealed from are reversed."

"Summary judgment is very valuable, however, lawyers use it in inappropriate cases, claiming no fact dispute when there actually is. Of course, in opposition, lawyers claim fact disputes when there aren't any. The judge has to make that determination. Some judges are timid and seldom grant these motions. I use them whenever possible to cut down further litigation."

ATTORNEY'S FORM

Total Responses: 26 (8 "outstate"; 18 "metro")⁸⁹

A-0. How long have you been in practice?

1-2 years: 0. 2-5 years: 3. 5-10 years: 7. 10 or more years: 16.

A-00. Do you primarily represent plaintiffs or defendants in civil litigation?⁹⁰

Plaintiffs: 4. Defendants: 9. A fairly even balance between plaintiffs and defendants: 13.

A-1. To the extent generalizations can be made, what are your views on the utility of summary judgment in Minnesota?

A. It is a very useful time-saving tool to weed out frivolous cases: 3.

B. It has some utility in streamlining the litigation process, but not to the extent that I would deem it "very useful": 13.

C. It is generally useless: 7 (5 of those responding primarily represent defendants while 2 represent a balance of plaintiffs and defendants).

D. Other opinions or additional comments:

"As a tool of discovery."

"Useful but in very few cases will a court make that difficult a decision. Very easy for the court to 'leave it to the jury.'"

89. See note 88 *supra*.

90. When the views of responding attorneys differ significantly according to whether they primarily represent plaintiffs, defendants, or an even balance of plaintiffs and defendants, that difference will be noted parenthetically following the question.

"Partial summary judgment is most effective. The rule is useless in federal court."

"Varying uses depending on which side you represent but not a frequent tool."

"In personal injury and product liability cases it has not been 'very useful,' however, in complex commercial litigation, *e.g.*, antitrust, franchise, etc., it is helpful, at least in limiting the issues."

"I do consider it essential to our system. It is not all that useful, however."

"Because too many district court judges have no guts."
[Qualifying an affirmative response to "C."]

- A-2. Approximately how many summary judgment motions would you estimate you have been involved in, as proponent or opponent?

Less than 10: 2. 10-25: 15. Over 25: 9.

- A-3. Regarding summary judgment motions you have made, approximately what percentage would you estimate have been granted by the trial court?

0-10%: 17 (65%) (50% of responding metro attorneys; 100% of responding outstate attorneys).

11-25%: 3 (12%).

26-50%: 4 (15%).

51-75%: 2 (8%).

- A-4. Have you ever had a summary judgment motion denied when you had essentially no doubt that it had substantial merit?

Often: 7 (56% of defendants' attorneys; 25% of plaintiffs' attorneys). Sometimes: 11. Rarely: 6. Never: 1.

- A-5. Have you ever made a summary judgment motion when you had substantial doubt about its merit?

Often: 0. Sometimes: 3. Rarely: 16. Never: 6.

- A-6. Do you routinely make summary judgment motions when you believe as a matter of law that they should be granted?

Yes: 13. No: 13.

- A-7. If your answer to question 6 is "no," why don't you? (You may check more than one).

A. Judges are too inclined to deny such motions: 13.

B. Many of my clients haven't been able to afford such motions: 1.

C. Other:

"All factors weighed, including judge's inclination and cost."

"A routine denial can establish 'bad law' in the particular case and prejudice a directed verdict at trial."

"Strategic reasons."

"Some state court judges are known never to grant summary judgment."

A-8. How would you rate the Minnesota Supreme Court's attitude on summary judgment?

- A. It reverses summary judgment more often than is warranted: 9.
- B. It affirms summary judgment more often than is warranted: 0.
- C. About right: 11.
- D. Other:

"The court is too willing to find fact issues on facts which are, in the context of the litigation, basically irrelevant or of very marginal relevance."

"It is very inconsistent, tending to decide cases based on the subject matter and merits of the litigation rather than on the rules governing summary judgment."

A-9. In general, how would you rate the attitudes of district judges you have dealt with towards summary judgment?

- A. Too many summary judgment motions are denied: 18.
- B. Too many summary judgment motions are granted: 1.
- C. About right: 3.
- D. Other:

"Very reluctant to grant."

"Depends on judge—some deny summary judgment motions as a matter of course because they believe all cases should be tried on the merits. Others are open to the motions and will grant summary judgment if it is an appropriate case."

"Some judges simply will not grant summary judgment no matter if the motion has merit."

"Greatly variable—some judges never grant it. None grant it too often."

A-10. Are there any ancillary reasons, *i.e.*, reasons other than the desire to obtain summary judgment, for which you have made a motion for summary judgment? If so, please specify:

- "(1) To have the file assigned to a particular judge; and
- (2) discovery method."

"To educate the court about the strength of my positions."

"As a defendant it's sometimes a useful discovery device."

"I may make a motion for summary judgment in order to prevent the other side from doing so. By making my motion first, it requires them to come in and allege factual

issues that prevent the granting of my motion and so impairs their ability to make a motion.”

“Obtain information as to the other side’s strengths and weaknesses, smoke out positions, and set the judge up for later rulings or trial by getting him involved in the merits.”

“Discovery.”

“Yes—partial summary judgment to narrow issues and ease proof problems or liability questions at trial. Also, I have brought motions for summary judgment to push the parties towards settlement.”

“I often use motions for summary judgment to eliminate some counts. I may make the motion to demonstrate to a defense client that the case could result in judgment for plaintiff and to be given settlement authority.”

“To force opposing parties to disclose their theory of the case in greater detail—especially when responses to discovery have been evasive.”

“Occasionally to pin the other side down to a position and discover facts supporting the same.”

“To delineate and eliminate issues, when an issue may be unclear, to try and get an early certification to the Minnesota Supreme Court, and for leverage in settlement negotiations.”

“Yes—to demonstrate to the other attorneys the strengths of our legal arguments and force them to start their legal research early.”

“Yes—occasionally useful as a discovery tool, or to force the opponent to show his hand, or to put settlement pressure on the opponent.”

- A-11. Please indicate whether you believe the following statements are more or less accurate.
- A. Many district judges deny summary judgment motions as a matter of course. Accurate: 21 (one crossed out “many” and wrote in “some”). Not accurate: 5.
 - B. Many district judges deny summary judgment motions primarily because of fear of reversal. Accurate: 11. Not accurate: 13.
 - C. Generally speaking, it is a waste of time to make a motion for summary judgment, even where such a motion has intrinsic merit as a matter of law. Accurate: 10. Not accurate: 15.
- A-12. What are the motives for which you make motions for summary judgment?
- A. To decrease the expense of litigation and avoid a needless

trial (or to limit the issues in cases of partial summary judgment). Always: 8. Most of the time: 12. Around 50% of the time: 5. Rarely: 1. Never: 0.

- B. To increase the expense of litigation to my opponent. Always: 0. Most of the time: 0. Around 50% of the time: 0. Rarely: 5. Never: 21.
- C. To obtain information from my opponent which may be difficult to obtain under other procedural rules. Always: 0. Most of the time: 2. Around 50% of the time: 1. Rarely: 16. Never: 7.
- D. To avoid potential malpractice claims. Always: 0. Most of the time: 0. Around 50% of the time: 0. Rarely: 5. Never: 20.
- E. To show my client that I am "doing something." Always: 0. Most of the time: 0. Around 50% of the time: 0. Rarely: 5. Never: 21.
- F. Other motives:

"Educate the judge as to the merits of the case."

"Client insists. To set up certified question on jurisdiction for interlocutory appeal where denial is anticipated."

"To prepare a record for appeal."

"To gain settlement authority from defense clients (generally in commercial litigation)."

"To assess judicial reaction to novel arguments or issues of first impression."

- A-13. For what motives do you believe other attorneys representing plaintiffs make motions for summary judgment?
 - A. To decrease the expense of litigation and avoid a needless trial (or to limit the issues in cases of partial summary judgment). Always: 1. Most of the time: 17. Around 50% of the time: 5. Rarely: 1. Never: 1.
 - B. To increase the ultimate expense of the litigation to their client and thereby primarily benefit themselves financially. Always: 0. Most of the time: 1. Around 50% of the time: 1. Rarely: 15. Never: 8.
 - C. To increase the expense of litigation to their opponents. Always: 0. Most of the time: 1. Around 50% of the time: 3. Rarely: 17. Never: 4.
 - D. To obtain information from their opponents which may be difficult to obtain under other procedural rules. Always: 0. Most of the time: 1. Around 50% of the time: 1. Rarely: 19. Never: 4.
 - E. To avoid potential malpractice claims. Always: 0. Most of

- the time: 0. Around 50% of the time: 0. Rarely: 16. Never: 9.
- F. To impress their clients that they are "doing something."
Always: 0. Most of the time: 0. Around 50% of the time: 4. Rarely: 18. Never: 3.
- G. Other motives:
"Educate the judge."
- A-14. For what motives do you believe other attorneys representing defendants make motions for summary judgment?
- A. To decrease the expense of litigation and avoid a needless trial (or to limit the issues in cases of partial summary judgment). Always: 2. Most of the time: 14. Around 50% of the time: 7. Rarely: 1. Never: 1.
- B. To increase the ultimate expense of the litigation to their client and thereby primarily benefit themselves financially. Always: 0. Most of the time: 1. Around 50% of the time: 3. Rarely: 15. Never: 6.
- C. To increase the expense of litigation to their opponents. Always: 0. Most of the time: 0. Around 50% of the time: 7. Rarely: 15. Never: 3.
- D. To obtain information from their opponents which may be difficult to obtain under other procedural rules. Always: 0. Most of the time: 2. Around 50% of the time: 4. Rarely: 15. Never: 4.
- E. To avoid potential malpractice claims. Always: 0. Most of the time: 0. Around 50% of the time: 1. Rarely: 16. Never: 8.
- F. To show their clients that they are "doing something."
Always: 0. Most of the time: 1. Around 50% of the time: 2. Rarely: 19. Never: 3.
- G. Other motives:
"Educate the judge."
"Avoid jury trial."
- A-15. Add any additional comments you wish to make:
"There is a vast difference between state and federal court in treatment of such motions. The Eighth Circuit has virtually abolished the rule, in the view of the district court judges. It is also granted more often outstate than in Hennepin and Ramsey counties."
"Several years ago I had a summary judgment motion denied when it was clear to me and the opponent that according to the state of the law at that time, the judgment should have been granted. That would have allowed for an immediate appeal to the supreme court. The court, after denying the motion, put the litigants through two bi-

furcated trials on liability and damages, ultimately resulting in two supreme court appeals. Eventually the supreme court found that the statute on which the summary judgment motion was made was unconstitutional. Tremendous expense could have been avoided had the summary judgment motion been granted in the first place. We could have then taken an early appeal and had that single issue resolved, saving twenty-two trial days and two supreme court appeals before getting the final answer. That attitude of unwillingness by the trial bench provided a very wasteful experience in terms of money and time for the litigant."

"Summary judgment should always be timed for hearing before a judge who will listen—many will not. Its primary utility is the resolution of simple, stark legal questions, *e.g.*, statute of limitations. The most ignored aspect of Rule 56 is the requirement that opponents produce competent evidence in rebuttal. Many judges allow attorneys to file affidavits over their own signature. I have seen motions denied where there was no competent rebuttal on the basis that the trial might produce evidence in rebuttal."

"Trial judges get reversed too often when they grant summary judgment motions. Consequently, they avoid them since they can't get reversed if they deny them."

"Plaintiffs can benefit from defendants' summary judgment motions by pretrial preparation, *i.e.*, it makes plaintiffs get their case ready for trial."

"Trial courts should be more courageous in granting the motion where the situation is very clear."